rabies, though it imposed no further duty upon the owner, since he had no notice of it, did not alter the duty already imposed of restraining the dog from biting. Having failed in this, the defendant was rightly held liable for the death that resulted.

Amici Curiae.— In all trials, while the parties supply the knowledge of the facts particular to their quarrel, the court on its part supplies the necessary knowledge of law and of such fact, generally accepted, as will be judicially noticed.[1] In many cases a court has discretion to inform itself, in addition, of facts beyond the scope of judicial notice and to act upon them *sua sponte*, to prevent a miscarriage of justice.[2] To fulfill all these duties a court may frequently require more than that assistance which is usually rendered by the counsel of parties to the case. Accordingly, the custom was early adopted [3] and has been uniformly adhered to of allowing counsel unconnected with a case to give advice, either on request of the court or by its permission,[4] as *amici curiae*. Even a mere bystander may so appear.[5] The advice so given is embodied in the form of a suggestion.[6] It is often referred to as a motion,[7] although denial of such a motion gives no right of appeal.[8] Nor may either party object to the receipt of a suggestion of this sort unless it was clearly improper.[9] An *amicus curiae* cannot perform any act on behalf of a party; [10] his

---

[1] Ryder *v.* Wombwell, L. R. 4 Ex. 32 (1868); Clough *v.* Goggins, 40 Ia. 325 (1875). See 4 Wigmore, Evidence, §§ 2565–2582.

[2] Coulson *v.* Disborough, [1894] 2 Q. B. 316; Serle *v.* St. Eloy, 2 P. Wms. 386 (1726). And see other examples in notes 18, 19, 21–25, *infra*.

[3] Collections of the cases appearing in the Year Books will be found in Theloall's Abridgment, 200, and in 2 Viner's Abridgment, 475–476. One of the earliest cases in which the term appears is Y. B. 4 Hen. VI. 16 (1426). All pleaders (countors), as distinguished from attorneys, were in their beginnings curiously similar to *amici curiae*. See 1 Pollock and Maitland, History of English Law, 2 ed., 211–217. In theory all argument of law before a court is directed rather to inform the court than to persuade it.

[4] Post *v.* Louis, 172 N. Y. Supp. 561 (1918). In this case the appellate court refused to force upon the trial court the advice of an *amicus curiae* which the trial court had declined.

[5] Falmouth *v.* Strode, 11 Mod. 136, 88 Reprint 949 (1708); Williams *v.* Blunt, 2 Mass. 207 (1806). The statute of 5 Hen. IV, c. 8 (1403) (1 Stat. at L. 458), provided with reference to feigned suits of debt: "(5) It is ordained and stablished, That the Justices in the King's Courts, and other Judges, before whom such Suits and Actions . . . shall be sued and taken, shall have Power to examine the Attorneys, and others whom please them, and thereupon to receive the Defendants to their Law, etc." It has been said that a statute of 4 Hen. IV (1403) extends the privilege of appearing as *amicus curiae*, previously confined to lawyers, to all bystanders. See "*Amicus Curiae*," 11 Pitts. Leg. Jour. 321. If the reference is to the provision above, it somewhat misstates the effect of the words. It can hardly be said that every witness called by a judge is an *amicus curiae*, and the converse is certainly not true.

[6] The *Maipo*, 252 Fed. 627 (1918).

[7] Haley *v.* Bank, 21 Nev. 127, 26 Pac. 64 (1891).

[8] Birmingham Loan Co. *v.* National Bank, 100 Ala. 249 (1893); Douglas *v.* Trust Co. of Georgia, 147 Ga. 724, 95 S. E. 219 (1918).

[9] The *Claveresk*, 264 Fed. 276 (1920).

[10] Thus he may not give notice of a motion for a rehearing. Burns *v.* State, 173 Pac. 785 (Wyo.) (1918).

suggestions are simply for the purpose of supplementing the information of the court. He represents no one and obviously no one is bound by what he does.[11]

Upon any question of law an *amicus curiae* may inform the court in any manner open to a party. The court's knowledge of domestic law is less uncertain now than when the custom of *amici curiae* originated.[12] But greater certainty is more than counterbalanced by increased complexity. Briefs of *amici curiae* are often submitted where the court feels that the case is of exceptional moment and demands unusually careful consideration.[13] In such a brief, cases are cited and points of law presented, as on an ordinary brief; and the brief is usually argued.[14] It would even seem that if a statute is ambiguous an *amicus curiae* might introduce proper evidence of the intention of the legislators.[15]

Many of the orthodox definitions of the *amicus curiae* would draw the line here, for they confine the suggestions which he may make to "matters of law." [16] Taken literally, this would exclude the majority of the cases. The practice is not so limited.

A suggestion of a fact of which judicial notice might properly be taken is, of course, seldom necessary, but in cases where such a fact is not obvious, an *amicus curiae* might well suggest it, if necessary to prevent the court from erring. And wherever the court might properly seek out information and act *sua sponte* [17] it may permit *amici curiae* to suggest

---

[11] But see The Prince's Case, 8 Co. 1 (1606). In this case an *amicus curiae* was also a party and was bound, of course, as a party. A court may properly exercise its discretion to deny the application of a party to appear as *amicus curiae*, because of the dangers involved. Todd *v.* Rhodes, 193 Pac. 894 (Kan.) (1920). See Browne *v.* Walker, 2 Show. K. B. 406 (1684). A recent case expresses the opinion that one whose interests are represented by an *amicus curiae* is bound as if he were a party. See Peterson *v.* Lewis, 78 Ore. 641, 154 Pac. 101 (1916). This is difficult to support on principle.

[12] See The Prince's Case, *supra*, at 15, 29. This gives a vivid picture of the *amicus curiae* as an assistant in the research of the court. "Ut amici curiae and to inform the court of the truth, and of the state (estate) which the King that now is hath, etc., they repeated to the Court part of the act of 1 H. 7, concerning the said duchy of Cornwall" but the court resolved "that the act of 1 H. 7, which Hele Serjeant and the said Warwick have pleaded ut amici curiae to inform the court of the truth, avails them not, for . . . in truth the Serjeant and his son have not performed the office of a friend or of a good informer, for they have omitted one clause in the same act . . . and have thereby endeavored to deceive the court and suppress the truth."

[13] See The Second Employers' Liability Cases, 223 U. S. 1, 16 (1912); The Minnesota Rate Cases, 230 U. S. 352, 363–364 (1913); Colyer *v.* Skeffington, 265 Fed. 17 (1920).

[14] See *Ex parte* Randolph, 2 Brock. (U. S.) 447 (1833).

[15] Horton *v.* Ruesby, Comb. 33, 90 Reprint 326 (1687). In this case it was argued that the Statute of Frauds and Perjuries was not intended to cover a certain situation, and "Sir G. Treby (ut *amicus curiae*), said he was present at the making of the said Statute, and that was the Intention of the Parliament. And a Supersedeas was deny'd." Such delightful informality would not be allowable to-day. See United States *v.* St. Paul Ry., 247 U. S. 310, 318 (1918).

[16] See ANDERSON, LAW DICT.; 1 BOUVIER, LAW DICT., 8 ed.; 1 TOMLIN, LAW DICT.

[17] It is to be noted that a judge may not act upon his information as an individual. Gibson *v.* Von Glahn Hotel Co., 185 N. Y. Supp. 154 (1920). See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 291. It follows that any information as to facts not judicially noticeable must be proved by proper evidence.

and prove relevant facts,[18] and to move that the court take action.[19] Beyond this, however, the practice must not go. An *amicus curiae* may not act for a party nor introduce proof of facts upon which the court might not in its discretion act without a motion.[20] A court acts in this way, if properly informed, for the purpose of preventing useless litigation or in order to protect the interests of a person for whom the court has a special regard. Thus an *amicus curiae* may properly intervene to protect the public against the misconduct of officials,[21] or to have a guardian appointed for an infant,[22] or to have an unworthy guardian removed,[23] or to secure the interests of a defendant in a criminal case.[24] And it does not seem to have been doubted that an *amicus curiae* may suggest facts which, if proved, would negative the jurisdiction of the court.[25]

An exception is created by recent decisions of the United States Supreme Court, holding that it is improper to allow counsel for a foreign embassy to appear as *amici curiae* in order to suggest facts negativing jurisdiction.[26] The opposite result had been reached in the lower federal courts.[27] The opinions suggest that the proper procedure is by diplomatic representations,[28] which result in a suggestion submitted by the proper United States official, or by the foreign nation's coming in as a party. While such diplomatic representations are always proper,[29] they had not heretofore been required in all such cases.[30] This adoption of a stiff procedure may be justified by the desirability of avoiding informalities in anything savoring of international relations. In theory it seems somewhat difficult to distinguish between counsel who act as *amici curiae* on behalf of a foreign sovereignty and those who so appear for any other reason. The essential purpose of the *amicus curiae*, as his name implies, is not to represent the interests of any person, but to

---

[18] Dove *v.* Martin, 1 Show. K. B. 56, Comb. 169 (1689); E. B. *v.* E. C. B., 28 Barb. (N. Y.) 299 (1858); Matter of Arszman, 40 Ind. App. 218, 81 N. E. 680 (1907). The last case shows that an *amicus curiae* may examine witnesses.

[19] Falmouth *v.* Strode, *supra; Re* Barr's Will, 30 Wkly. L. Bul. 386 (Ohio Com. Pl.) (1891).

[20] Moseby *v.* Burrow, 52 Tex. 396 (1880); Bass *v.* Fontleroy, 11 Tex. 698 (1854); Martin *v.* Tapley, 119 Mass. 116 (1875).

[21] Matter of Mumma's Estate, 2 Pa. Dist. Rep. 592 (1893).

[22] Beard *v.* Travers, 1 Ves. Sr. 313 (1749).

[23] Matter of Green's Estate, 3 Brewst. (Pa.) 427 (1869).

[24] State *v.* Hillstrom, 46 Utah, 341, 150 Pac. 935 (1915). In this case a lawyer was appointed by the court to defend the prisoner. The prisoner discharged him. He was thereafter allowed to serve as *amicus curiae*.

[25] Hassard *v.* United States of Mexico, 29 Misc. (N. Y.) 511 (1899), affirmed without opinion, 173 N. Y. 645, 66 N. E. 1110 (1903); The *Maipo*, *supra;* The *Claveresk*, *supra*.

[26] *In re* Muir, Master of the *Gleneden*, U. S. Sup. Ct., October Term, 1920, No. 18, Original; The *Pesaro*, U. S. Sup. Ct., October Term, 1920, No. 317. For the facts of these cases see RECENT CASES, p. 782, *infra*.

[27] The *Maipo*, *supra;* The *Claveresk*, *supra*. And see Mason *v.* Intercolonial Ry. of Canada, 197 Mass. 349 (1908). In this case the situation was similar, except that the *amicus curiae* was not counsel for the foreign government involved.

[28] The Schooner *Exchange v.* M'Faddon, 7 Cranch (U. S.), 116 (1812); Hassard *v.* United States of Mexico, *supra*.

[29] The Schooner *Exchange v.* M'Faddon, *supra;* The *Constitution*, L. R. 4 P. D. 39 (1879).

[30] Mason *v.* Intercolonial Ry. of Canada, *supra*. See The *Maipo*, *supra*, at 628.

assist the court. Whatever a court may know or do on its own initiative an *amicus curiae* may suggest, and it is usually immaterial who prompts him to appear.

STANDARDS IN INTERNATIONAL LAW. — As Dean Pound has clearly demonstrated, the desirability of rules, capable of strictly logical application, or standards, varying in application with changes in circumstances, depends upon the interests to be protected.[1] When the law is protecting interests of substance, upholding the social interest in the security of transactions and acquisitions, the utmost certainty is necessary. Fixed rules are required, upon which the business world can rely, and in that way avoid disputes and expensive litigation.[2] Such are the Rule in Shelley's Case in the Law of Property and the rules of negotiability in the Law of Negotiable Instruments. But when the law is protecting interests of personality, defining the limits of legal conduct, the rights of individuals outweigh the need for reliable rules. The infinitely varied combinations of facts call for the infusion of a discretionary element into the legal requirements of the situation. For this purpose the law employs standards,[3] which in prescribing the limits of legal conduct allow a certain margin of attainment within the bounds of reason. Such are the standards of due care in the law of torts,[4] of reasonable service and reasonable facilities in the law of public utilities,[5] of fiduciary duty in equity.[6] These standards "formulate the general expectation of society as to how individuals will act in the course of their undertakings . . . devised to guide the triers of fact in applying to each unique set of circumstances their common sense, resulting from their experience."[7] Action which is due, reasonable, appropriate to the

---

[1] See Roscoe Pound, "Juristic Science and Law," 31 HARV. L. REV. 1047, 1060–1063; Roscoe Pound, "The Administrative Application of Legal Standards," 44 REP. AM. BAR ASSN., 445.

[2] See Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 454, 455; J. H. Beale, Jr., "What Law Governs the Validity of a Contract?" 23 HARV. L. REV. 260, 264.

[3] See Roscoe Pound, "Juristic Science and Law," *supra*, 1061; Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 456, 457.

[4] See Yerkes *v.* N. P. R. Co., 112 Wis. 184, 193, 88 N. W. 33, 36 (1901).

[5] See Atlantic Coast Line Co. *v.* Wharton, 207 U. S. 328, 335 (1907); Loomis *v.* Lehigh Valley R. Co., 208 N. Y. 312, 322, 323, 101 N. E. 907, 911 (1913); Chicago, R. I. & P. R. Co. *v.* Lawton Refining Co., 253 Fed. 705, 707 (1918). See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 797.

[6] See Robinson *v.* Roinstad, 180 N. W. (S. D.) 67, 68 (1920) (administrator); Magruder *v.* Drury, 235 U. S. 106, 119, 120 (1914) (trustee); Lurie *v.* Pinanski, 215 Mass. 229, 231, 102 N. E. 629, 634 (1913) (partner); Essex Trust Co. *v.* Enright, 214 Mass. 507, 510, 511, 102 N. E. 441, 442 (1913) (employee); Rolikatis *v.* Lovett, 213 Mass. 545, 548, 100 N. E. 748, 749 (1913) (attorney); Rogers *v.* Genung, 76 N. J. E. 306, 312, 316, 74 Atl. 473, 475, 477 (1909) (broker).

Compare the duty of a trustee investing funds to use such care as would a reasonably prudent family man, investing with a view to protecting absolutely dependent people. See Rae *v.* Meek, 14 A. C. 558, 569, 570 (1889); Hart's Estate (No. 1), 203 Pa. 480, 485, 486, 53 Atl. 364, 366 (1902); Winder *v.* Nock, 104 Va. 759, 763, 52 S. E. 561, 563 (1906). See LORING, A TRUSTEE'S HANDBOOK, 1 ed., 69–82.

[7] See Roscoe Pound, "The Administrative Application of Legal Standards," *supra*, 457.